Ang Lit Yiang & Ors v Teoh Hing Yeu & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P-04-105-95
LAMIN PCA, ABU MANSOR AND ABDUL MALEK JJCA
5 OCTOBER 1996

Civil Procedure *— Appeal — Appeal to High Court — Point not raised on appeal — Appellate judge interfered with finding of trial judge on his own motion — Whether proper to do so*

This was an appeal against the decision of the judicial commissioner of the High Court, Pulau Pinang in two civil appeals. The two appeals were against the decision of the Butterworth Sessions Court in two civil actions — one filed by the mother of the rider of a motorcycle against the driver of a motorcar; the other by the parents of the pillion rider against the driver and owner of the said car. Both were consolidated in April 1993. The two vehicles were involved in an accident that took place on 9 April 1992. At the time of their untimely death, the rider of the motorcycle and the pillion were 20 and 16 years old respectively. For the purpose of the appeal before the High Court, the respondents — who were then the appellants — did not appeal on the question of multipliers and therefore did not plead in their memorandum of appeal whether the sessions court judge was wrong in law and in fact in taking the figure 16 to serve as a multiplier for both cases. They also did not apply to amend their memorandum of appeal at the hearing of the appeal. The judicial commissioner, on his own motion, reduced the years of purchase from 16 to 8 in the case of the motor-cyclist and from 16 to 10 in the case of the pillion rider. Counsel for the appellants submitted that it was wrong for the judicial commissioner on his own motion to reduce the years of purchase which is set out clearly in s 7(3)(iv)(d) of the Civil Law Act 1956.

Held, allowing the appeal:

It was most improper for an appellate judge on his own motion to disturb the finding of the court below on a point that was not being appealed on. An appellate judge should be slow to do so unless it has caused a failure of justice. For that reason, the decision of the sessions court judge was restored (see p 280E–F).

[Bahasa Malaysia summary

Ini adalah satu rayuan terhadap keputusan pesuruhjaya kehakiman Mahkamah Tinggi, Pulau Pinang dalam dua rayuan sivil. Kedua-dua rayuan itu adalah terhadap keputusan Mahkamah Sesyen, Butterworth dalam dua tindakan sivil — satu difailkan oleh ibu kepada penunggang motosikal terhadap pemandu kereta; satu lagi oleh ibu bapa pembonceng motosikal terhadap pemandu dan pemunya kereta tersebut. Kedua-dua tindakan dicantumkan pada bulan April 1993.

Kedua-dua kenderaan itu terlibat dalam satu kemalangan yang berlaku pada 9 April 1992. Pada masa kematian, penunggang motosikal berumur 20 tahun dan pembonceng berumur 16 tahun. Untuk tujuan rayuan di Mahkamah Tinggi, penentang — yang pada masa itu adalah perayu — tidak merayu atas persoalan pengganda dan oleh itu tidak memplid di dalam memorandum rayuan sama ada hakim mahkamah sesyen adalah salah dari segi undang-undang dan fakta dalam mengambil angka 16 sebagai pengganda untuk kedua-dua kes. Penentang juga tidak memohon untuk meminda memorandum rayuan pada masa perbicaraan rayuan. Pesuruhjaya kehakiman, atas usulnya sendiri, mengurangkan tahun belian (years of purchase) daripada 16 kepada 8 dalam kes penunggang motosikal dan daripada 16 kepada 10 dalam kes pembonceng. Peguam perayu menghujahkan bahawa adalah salah bagi pesuruhjaya kehakiman atas usulnya sendiri untuk mengurangkan tahun belian yang diperuntukkan secara nyata dalam s 7(3)(iv)(d) Akta Undang-Undang Sivil 1956.

Diputuskan, membenarkan rayuan:

Adalah paling tidak wajar bagi seseorang hakim rayuan atas usulnya sendiri untuk mengganggu penemuan mahkamah di bawah atas perkara yang tidak dibuat rayuan. Hakim rayuan sepatutnya tidak berbuat demikian melainkan ianya telah menyebabkan kegagalan keadilan. Untuk sebab ini, keputusan hakim mahkamah sesyen dikembalikan (lihat ms 280E–F).]

[*Editorial Notes*: The respondent had appealed to the Federal Court vide Civil Appeal No 08–92–96P]

Notes

For cases on appeal, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 259–699.

Case referred to

Chan Chin Ming & Anor v Lim Yok Eng [1994] 3 MLJ 233

Legislation referred to

Civil Law Act 1956 s 7(3)(iv)(d)

Appeal from: Civil Appeal No 12–4–94 consolidated with Civil Appeal No 12–3–94 (High Court, Pulau Pinang)

Baldev Singh Bhar (*DR Rajah* with him) (*Baldev Bhar Co*) for the appellants.

Tang Khye Kian (*Gerard Chan* with him) (*Tang Khye Kian & Co*) for the respondents.

Cur Adv Vult

Lamin PCA (delivering the judgment of the court): This is an appeal against the decision of the learned judicial commissioner of the High Court, Pulau Pinang made on 20 April 1995. His decision was in two civil appeals, namely Pulau Pinang High Court Civil Appeal Nos 12–3–94 and 12–4–94. The two appeals were against the decision of the Butterworth Sessions Court in two civil actions — one filed on 2 June 1992 by the mother of the rider (deceased) of a motorcycle PBU 6429 against the driver of a motorcar PAN 639 (Butterworth Sessions Court Civil Suit 53–141–1992); the other on 8 May 1992 by the parents of the pillion rider (deceased) against the driver and owner of the said car (Butterworth Sessions Court Civil Suit 53–117–1992). Both were consolidated on 8 April 1993. The two vehicles were involved in an accident that took place in the early hours of 9 April 1992. At the time of their untimely death, the rider of the motorcycle and the pillion were 20 and 16 years old respectively. (In his judgment, the learned judicial commissioner referred to their ages as being 21 and 15 respectively. The statements of claim carried the figure 20 in respect of the rider of the motorcycle, while that of the pillion carried the figure 16.)

The central point in the appeals before us was the question of the loss of support that was awarded to the mother of the deceased motor-cyclist and the parents of the deceased pillion under s 7(3)(iv)(d) of the Civil Law Act 1956. With regard to this item, submissions were made on the multiplicand and the multiplier in both cases. Learned counsel for the respondents, in sum, urged us to confirm in particular the multipliers as decided by the learned judicial commissioner in the light of the majority decision in *Chan Chin Ming & Anor v Lim Yok Eng* [1994] 3 MLJ 233.

Before we proceed to comment on the multipliers, we propose to first dispose of the matter of the multiplicands about which we are not at variance with the finding of the learned judicial commissioner who had this to say (at p 1 l of his judgment):

> On the evidence before the trial court, the motor-cyclist was earning between RM1,000–RM1,100 per month, giving RM400 a month — RM700 when his income improved — and he was giving RM700 a month to his mother just before he died. He was having his meals at his mother's house, and his food cost RM10–RM20 per day. The household spent RM30 a day on food. The trial court's assessment of RM450 per mensem as the loss of support was not unreasonable. Similarly, on the evidence that the pillion rider: (i) was working in a foundry; (ii) earning RM800 a month; (iii) giving RM500 a month to his parents (claimants) for the benefit of his elder brother (according to the father (SP3)) and for the benefit of the family (according to the mother (SP9)); and (iv) the RM500 was spent by the father; the trial court's assessment of RM200 per mensem as the loss of support was not unwarranted. The difference between this court and the trial court's assessment — so too in the case of the motor-cyclist — was negligible and did not warrant any interference.

With regard to the multipliers, learned counsel for the appellants submitted that it was wrong for the judicial commissioner on his own motion to reduce the years of purchase from 16 to 8 in the case of the motor-cyclist and from 16 to 10 in the case of the pillion rider. (There is some confusion here. In the order of the High Court dated 20 April 1995, it is stated that the multiplier is reduced from 16 to 8 in both cases. On the other hand, in the written judgment of the learned judicial commissioner, there appears the figure '10' in both cases instead of the figure '8'. However there was a reduction.)

Paragraph 2 of their memorandum of appeal reads:

> 2 The learned appellate judicial commissioner erred in law and in fact in reducing the years of purchase in both cases as there was no appeal by the appellants' counsel in his memorandum of appeal to reduce the years of purchase which is set out clearly in the Civil Law Act 1956 s 7(3)(iv) and 7(3)(iv)(d) and further there was no application to amend the memorandum of appeal at the hearing of the appeal.

For the purpose of the appeal before the High Court, the respondents — who were then the appellants — did not appeal on the question of multipliers and therefore did not plead in their memorandum of appeal whether the learned sessions court judge was wrong in law and in fact in taking the figure 16 to serve as a multiplier for both cases. They also did not apply to amend their memorandum of appeal at the hearing of the appeal. We think so too that it was most improper for an appellate judge on his own motion to disturb the finding of the court below on a point that was not being appealed on. An appellate judge should be slow to do so unless it has caused a failure of justice. For the reason we stated above and for that reason only, we restored the decision of the sessions court judge.

Appeal allowed.

Reported by Jafisah Jaafar